Supreme Court, U.S.
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Case No. 90-1792

In the Supreme Court
OF THE
United States of America

OCTOBER TERM, 1990

THE STATE OF OHIO, EX REL. RICHARD G. JOHNSON
Petitioner,

vs.

THE HONORABLE TERRENCE O'DONNELL, JUDGE,
PRUDENTIAL-BACHE SECURITIES, INC.,
AND
JAY H. SALAMON
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Ohio

BRIEF OF RESPONDENTS PRUDENTIAL-BACHE SECURITIES, INC. AND JAY H. SALAMON IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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B. STATUTES INVOLVED

I. OHIO REV. CODE SECTION 2505.03

(A) Every final order, judgment, or decree of a court and, when provided by law, the final order of any administrative officer, agency, board, department, tribunal, commission, or other instrumentality may be reviewed on appeal by a court of common pleas, a court of appeals, or the supreme court, whichever has jurisdiction.

(B) Unless, in the case of an administrative-related appeal, Chapter 119, or other sections of the Revised Code apply, such an appeal is governed by this chapter and, to the extent this chapter does not contain a relevant provision, the Rules of Appellate Procedure. When an administrative-related appeal is so governed, if it is necessary in applying the Rules of Appellate Procedure to such an appeal, the administrative officer, agency, board, department, tribunal, commission, or other instrumentality shall be treated as if it were a trial court whose final order, judgment, or decree is the subject of an appeal to a court of appeals or as if it were a clerk of such a trial court.

(C) An appeal of a final order, judgment, or decree of a court shall be governed by the Rules of Appellate Procedure or by the Rules of Practice of the Supreme Court, whichever are applicable, and, to the extent not in conflict with those rules, this chapter.

II. OHIO REV. CODE SECTION 2731.01

Mandamus is a writ, issued in the name of the state to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station.

III. OHIO REV. CODE SECTION 2731.02

The writ of mandamus may be allowed by the supreme court, the court of appeals, or the court of common pleas and shall be issued by the clerk of the court in which the application is made. Such writ may issue on the information of the party beneficially interested.

Such writ shall contain a copy of the petition, verification, and order of allowance.

C. STATEMENT OF THE CASE

Respondents have no particular quarrel with Petitioner's statement of proceedings in the Ohio Supreme Court, with the exception of his discussion regarding the alleged impossibility of raising his constitutional issues below.[1] While Petitioner's statement of the case is accurate as far as it goes, this Court cannot assess the Petitioner's arguments without knowing the basis of the mandamus action below and the facts that underlie Petitioner's dispute with the Ohio courts.

On April 24, 1989, Richard Johnson filed a five-count complaint against Prudential-Bache Securities, Inc. and three other defendants. Johnson, then a third-year law student, brought the action pro se.[2]

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[1]Respondents contend that there are no constitutional issues for this Court to review.

[2]Johnson has now been a licensed attorney for approximately nine months. On his letterhead and in advertisements published in print media, Johnson claims to have a "General Civil and Appellate Litigation Practice to the Profession and the Public — Concentrating in Professional Responsibility Issues: Disqualification . Legal Malpractice . Mandamus, Procedendo & Prohibition . Sanctions." The irony of this statement regarding Johnson's alleged areas of expertise will shortly be apparent to the Court.

Johnson's lawsuit generally concerned the actions of a securities broker who had provided services to the trustee of an investment account maintained for Johnson's benefit at Prudential-Bache. Johnson contended, among other things, that the improper actions of the Defendants had caused him to lose $150,000.00 in principal and interest. Johnson also sought a sizeable sum in punitive damages.

On or about May 23, 1989, attorney Jay H. Salamon, a respondent herein, telephoned Johnson, identified himself as counsel for Prudential-Bache, and requested a thirty day extension to respond to the Complaint. Johnson refused. Salamon thus informed Johnson that he would immediately file a motion asking the Court for an extension.

Salamon thereafter drafted a motion for extension of time and had it typed by his secretary. He reviewed the typed draft, revised and corrected it, and returned the draft to his secretary so that she could process his final revisions. However, on the following day, the date upon which the motion had to be filed, Salamon was away from his office. He thus telephoned his secretary and instructed her to sign his name to the motion, followed by her initials to show signing in a representative capacity. In giving her these instructions he intended to be bound by the signature and to make the guarantees required under Civ.R. 11.

Johnson was mailed his service copy of the motion for extension of time on May 25, 1989. For some reason, however, Johnson did not receive the motion and mistakenly concluded that Prudential-Bache had neither filed a responsive pleading nor moved for an extension of time. He thus filed on June 1, 1989 a motion to enter default judgment, incorrectly claiming that Prudential-Bache was "in default of Rule Day . . .". Johnson

demanded that he be awarded a default judgment of over Thirteen *Million* Dollars and sought an order divesting Prudential-Bache of "illegal profits" and revoking its right to conduct business within the State of Ohio.

Before the filing deadline arrived for Prudential-Bache to respond, Johnson apparently learned that a timely motion for extension of time *had* been filed. However, instead of choosing to drop the matter, he moved on June 10, 1989 to strike the motion for extension, incorrectly indicating that Prudential-Bache had failed to mail him a service copy.

On June 14, 1990, Prudential-Bache filed a brief opposing Johnson's motion to strike the request for extension of time. This opposition brief was accompanied by sworn affidavits stating that Johnson had been mailed a service copy by regular mail to the correct address, and that proof of such mailing had also been duly noted in the certificate of service contained in the motion for extension of time.

To this point, Johnson had thus filed two motions related to the extension of time; the first, a motion to enter default judgment based on the original erroneous belief that Prudential-Bache had not answered or sought an extension, and the second, a motion to strike based upon an equally erroneous belief that Prudential-Bache had not served Johnson with the motion for extension of time. Both contentions had been effectively rebutted. Nevertheless, Johnson launched a third assault, this time seeking to raise the argument that the motion for extension of time was invalid due to counsel's signature having been affixed by a secretary. In order to make this argument regarding the effect of the conformed signature, Johnson moved on June 15, 1989 for leave to file an amended motion to strike and an

amended motion for default judgment, which proposed amended motions he had attached to or attempted to file simultaneously with the "Motion for Leave to File Amended Motions." On June 30, 1989, Johnson also filed a motion demanding that the trial judge, Terrence O'Donnell, refer attorney Salamon to a disciplinary proceeding because Salamon had instructed his secretary to sign Salamon's name to the motion for extension of time.[3]

On August 3, 1989, Judge O'Donnell made a number of significant rulings. He denied the motion to refer Salamon to disciplinary proceedings. He overruled Johnson's original motion to strike and for default judgment. He also overruled Johnson's motion for *leave* to file the amended motions to strike and for default judgment, meaning that such amended motions were treated as mere attachments and were never filed of record. Finally, because Johnson had declined the Court's invitation to voluntarily withdraw these and a multitude of other harassing motions, the Court granted a joint motion of Prudential-Bache and co-defendant Shearson Lehman Hutton to sanction Johnson under Ohio's frivolous conduct statute.[4]

On August 22, 1989, Johnson appealed the Court's sanction order and its refusal to refer Salamon for disciplinary proceedings. Shortly thereafter, he also asked the appellate court for leave to expand his appeal to include the alleged denial of his request to strike the

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[3]Johnson could have instituted a disciplinary proceeding on his own merely by filing a complaint with one of the numerous Certified Grievance Committees established by the Ohio Supreme Court.

[4]A damage hearing on the frivolous conduct sanctions has not yet occurred. Only Prudential-Bache will be participating in that hearing since petitioner recently settled his multi-million dollar claims against Shearson Lehman Hutton for the sum of $500.00.

Prudential-Bache motion for extension of time. On September 6, 1989, Johnson also filed a motion with the Supreme Court of Ohio seeking disqualification of the trial judge, Terrence O'Donnell, on the grounds that Judge O'Donnell was allegedly prejudiced and hostile toward him. All of these efforts were rebuffed. The Court of Appeals granted a motion of Prudential-Bache to dismiss Johnson's appeal for lack of jurisdiction since the orders appealed from were all interlocutory. Thereafter, the Chief Justice of the Ohio Supreme Court dismissed Johnson's motion to disqualify Judge O'Donnell, finding that Johnson's allegations did not support the requested relief.

Johnson filed his mandamus and procedendo complaint in the Ohio Supreme Court on November 10, 1989, seeking a writ requiring Judge O'Donnell to grant Johnson's motions for default judgment and to refer Prudential-Bache counsel to disciplinary proceedings. Prudential-Bache and Salamon were granted leave to intervene. They and Judge O'Donnell filed motions to dismiss and for sanctions, Johnson in turn sought frivolous conduct sanctions against Judge O'Donnell, and all motions were denied. In the context of this briefing process, Johnson vilified Judge O'Donnell, accusing him of lacking "a basic knowledge of civil procedure," referring to Judge O'Donnell's sanctions motion as "a kindergarten effort" and characterizing the Judge's actions as "reprehensible," "sham," "false" and "frivolous."

On January 30, 1991, with six of seven Justices participating, Johnson's mandamus action was dismissed *sua sponte*.[5]

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[5]Justice Andrew Douglas, in voting to dismiss, expressly stated in writing that his colleagues should consider sanctions against Johnson. Moreover, Justice Alice Resnick had previously voted to grant

D. SUMMARY OF THE ARGUMENT

Petitioner claims that the State of Ohio has by way of statute granted him and all other Ohio litigants an automatic right to appeal a final order, judgment or decree of the Ohio Court of Common Pleas, the Court of Appeals or the Supreme Court. Based on this contention, he claims that the failure of the State of Ohio to provide a procedure by which he can appeal the Ohio Supreme Court's *sua sponte* dismissal of his original action violates his constitutional right to procedural due process. Petitioner is wrong for two reasons. First, the statute upon which he relies only provides a right of appeal if there is a court with jurisdiction to hear the appeal. No Ohio tribunal has jurisdiction to hear appeals from the Ohio Supreme Court. Second, the absence of an appellate tribunal in this case is due solely to the fact that Petitioner voluntarily filed his original action in the state's court of last resort, rather than in an intermediate appellate court from which appeal to a higher court would have been possible.

Petitioner also contends that he was denied his due process right to a hearing before a fair and impartial tribunal, arguing that when the Supreme Court of Ohio dismissed his original action *sua sponte*, despite having subject matter jurisdiction and after seemingly having considered the merits of the case, the Court could only have been motivated by prejudice and hostility toward Petitioner. Petitioner's argument is based on speculation derived from a misunderstanding of *sua sponte* dismissals. The Court had inherent power to dismiss his case at any time if the action proved to be frivolous, harassing, vexatious or motivated by bad faith.

Respondents' motions for frivolous conduct sanctions against Johnson.

Finally, Petitioner argues that he was entitled to have an explanatory opinion issued by the Ohio Supreme Court. If that is the only issue for review, this is not a case worthy of consideration by the Supreme Court of the United States of America.

E. ARGUMENT

1. THERE ARE NO CONSTITUTIONAL IMPLICATIONS TO THE FACT THAT THE STATE OF OHIO HAS NOT CREATED A PROCEDURE BY WHICH A RELATOR CAN APPEAL DECISIONS OF THE SUPREME COURT OF OHIO. THE STATE OF OHIO HAS NOT PROVIDED A RIGHT OF APPEAL FROM DECISIONS OF THE SUPREME COURT OF OHIO AND IN THE ABSENCE OF SUCH RIGHT, DUE PROCESS DOES NOT REQUIRE THE ESTABLISHMENT OF APPELLATE PROCEDURES.

Petitioner's first question presented for review is whether the State of Ohio denied him a procedural due process right to appeal the dismissal of his mandamus action. He answers this question in the affirmative.

Petitioner admits that states are not constitutionally required to bestow a right of appeal, but he asserts that if they nonetheless choose to do so, they are required by due process considerations to afford all litigants an equal means of exercising that right. Petitioner claims that Ohio *has* vested in him and all other citizens a right of appeal from all final orders, basing his contention on Ohio Rev. Code Section 2505.03(A). That provision reads in pertinent part:

> Every final order, judgment, or decree of a court. . . *may* be reviewed on appeal by a court of common pleas, a court of

> appeals, or the Supreme Court, *whichever has jurisdiction.* (Emphasis added)

Petitioner notes that the dismissal of his action by the Ohio Supreme Court was a final order. He asserts that such order may be appealed pursuant to the above statute, but decries the fact that the State of Ohio has provided no means for him to perfect an appeal. This, he contends, is a denial of due process.

Petitioner's argument is obviously flawed in two respects. First, his premise that the State of Ohio has granted him an automatic right to appeal a judgment of the Ohio Supreme Court is fallacious. Second, he neglects to mention that it was his own choice to initiate his original action in the state's highest court rather than in an intermediate court of appeals.

Contrary to Petitioner's major premise, the statutory provision relied upon by Petitioner does not create a right of appeal from every final order, judgment or decree. It merely says that such rulings may be reviewed on appeal by whichever of the three state courts — common pleas, court of appeals, or supreme court — has jurisdiction to hear such an appeal.

In this case, none of the three courts has jurisdiction to hear Johnson's appeal. Thus, Ohio Rev. Code Section 2505.03(A), by its express terms, has no application to final orders in an original action before the Ohio Supreme Court. Under Petitioner's illogical construction of Ohio Rev. Code Section 2505.03(A), every final order of an Ohio court is appealable, regardless of how many appeals have preceded the ruling. Appeal might follow appeal for years on end if Petitioner had his way. Obviously, however, Petitioner's reading of the statute is preposterous and his claim of constitutional deprivation is flawed, particularly in light of his admission that a

state is under no constitutional obligation to provide an appellate process in the first place.

It must also be emphasized that the one-shot nature of Petitioner's mandamus effort is attributable solely to his own desire to proceed directly to the Ohio Supreme Court. In Ohio, a writ may be issued to any "inferior tribunal" by the supreme court, court of appeals or common pleas court. (Ohio Rev. Code Section 2731.01; Section 2731.02) Thus, in seeking issuance of a writ to the common pleas court, Johnson need not have commenced his action in the highest court. He could instead have filed in the Court of Appeals for Cuyahoga County, Ohio, thereby preserving the potential for appeal to the Ohio Supreme Court if the intermediate appellate court committed error. Johnson purposely chose to forgo that option and as a consequence, to forgo an opportunity for appeal.

2. THE FACT THAT THE OHIO SUPREME COURT DISMISSED PETITIONER'S ORIGINAL ACTION *SUA SPONTE* AFTER OVERRULING RESPONDENT'S MOTIONS TO DISMISS AND ACCEPTING EVIDENTIARY SUBMISSIONS AND BRIEFS DOES NOT ESTABLISH OR EVEN INTIMATE A DENIAL OF PETITIONER'S DUE PROCESS RIGHT TO A HEARING BEFORE AN IMPARTIAL TRIBUNAL OR OF HIS RIGHT OF ACCESS TO THE COURTS.

In Petitioner's overlapping second and third questions for review, he asks whether the Ohio Supreme Court's *sua sponte* dismissal of his original action establishes that he was denied his procedural due process right to trial before a fair and impartial tribunal and of his right of access to the courts. Petitioner asserts that it was "entirely bizarre and totally unfounded" for the

Ohio Supreme Court to dismiss his case *sua sponte* after the Court had allegedly reviewed the merits. He thus concludes that the Court's actions were motivated by hostility and prejudice. Petitioner asserts that a *sua sponte* dismissal by a court sitting as a trial court can only be based on lack of subject matter jurisdiction, and since the Supreme Court clearly had jurisdiction, the only explanation for the dismissal is purposeful judicial sabotage.

Obviously, if anything is to be characterized as bizarre and unfounded, it is Petitioner's claim of judicial bias. An accusation that all six participating Supreme Court Justices were prejudiced, coupled with Petitioner's similar accusations against the trial judge, implies that Petitioner suffers from severe paranoia.

Petitioner's fundamental understanding of the Court's inherent power to dismiss is simply in error. He says that a *sua sponte* dismissal can only be based on lack of subject matter jurisdiction. However,

> "Courts ha[ve] broad, inherent powers, not limited by statute, to dismiss an action that is: collusive; frivolous; vexatious and fraudulent; brought for an improper ulterior purpose; [or] being utilized for 'a dishonest and corrupt purpose on the part of the complainant and his solicitor.' The power may be invoked at any time during the progress of the action." 1 *Moore's Fed. Practice* (2d Ed.) Paragraph 60[6], pp. 639-640 (1991).

The Ohio Supreme Court has stated, "A court has inherent power to order stricken from its files any sham or frivolous pleading." *State ex rel. Crow v. Weygandt*, 170 Ohio St. 81, 162 N.E.2d 845 (1959). See, for example, *Roby v. Skupien*, 762 F. Supp. 813 (N.D. Ill. 1991) ("There is . . . well established authority that this Court has broad, inherent power to *sua sponte* dismiss an action . . . which is frivolous, sham, vexatious or brought in bad faith."); *Rinehart v. Stauffer*, 638 F.2d 1169 (9th

Cir. 1979) ("A district court has the power to dismiss a complaint if it is frivolous or brought for some ulterior motive."); *Aoude v. Mobile Oil Corp.*, 892 F.2d 1115 (1st Cir. 1989) ("The Court's inherent power includes 'the ability to do whatever is reasonably necessary to deter abuse of the judicial process.' ").

Petitioner asserts that it was established beyond doubt that his claims in mandamus and procedendo were potentially valid, pointing to the fact that Respondent's motions to dismiss were overruled. However, it is likely that upon subjecting Petitioner's complaint to closer scrutiny, aided by submission of the record below and by full briefing from the parties, the Justices quickly realized that the mandamus action was a sham, intended primarily to vex and harass the Respondents, and that Johnson was merely using mandamus as an unauthorized means of appealing his prior setback in the Court of Appeals.

Certainly, the Ohio Supreme Court had ample reason to conclude that Johnson was primarily motivated by bad faith. As noted earlier, Johnson's briefs contained vicious, insulting remarks about Judge O'Donnell's character and his ability as a jurist. Johnson also blithely leveled invectives at the other Respondents, at one point writing that Prudential-Bache was "a lying, cheating, unfair, amoral, discourteous, arrogant, centi-billionaire, Forbes 10 (assets) corporation." Indeed, Petitioner even urged the Supreme Court to ignore common pleas docket entries because, according to Petitioner, such entries were "recorded illegibly by a bunch of high-school flunkies in the clerk's office."

Moreover, until the Supreme Court received evidence and merit briefs, the Justices would not have known that Johnson had fabricated or negligently misrepresented the facts regarding the trial court's actions

below. Specifically, only after the motions to dismiss had been overruled and merit briefs had been filed was the Court advised that leave to file amended motions to strike and for default judgment had been denied by Judge O'Donnell, meaning that Johnson had never filed an amended motion to strike as he claimed in his petition. Thus, the record did not support Johnson's version of key facts supposedly underlying his claims for relief.

Under the above circumstances, and in light of the many legal defects pointed out by Respondents in their briefs, the Court had ample grounds to dismiss the action *sua sponte* as scandalous, frivolous and deceptive. Indeed, Justice Alice Resnick had previously urged the granting of Respondents' motions for frivolous conduct sanctions against Johnson and Justice Andrew Douglas accompanied his vote to dismiss with a note suggesting that the Supreme Court should consider its own sanctions against Johnson. While the other four Justices did not choose to comment directly on Petitioner's obvious misconduct, they were no doubt sufficiently appalled at his actions and arguments to dispose of his complaint on their own motion.

In sum, the sole basis for Petitioner's claim of bias is the dismissal of his action. However, the existence of even one alternative explanation for the dismissal renders his theory speculative and illogical. There is no way this Court could find that the dismissal violated Petitioner's right to procedural due process.

3. THE FACT THAT THE SUPREME COURT OF OHIO DID NOT ACCOMPANY ITS DISMISSAL WITH AN EXPLANATORY OPINION IS HARDLY A BASIS FOR THIS COURT TO ENTERTAIN PETITIONER'S APPEAL.

Petitioner argues that the Ohio Supreme Court was required to give reasons for its dismissal. Frankly, Respondents do not know why the Court did not write an opinion, nor do they care. They would not be affected one way or the other if this Court were to order the Ohio Supreme Court to prepare an opinion. Respondents believe, however, that an overburdened Supreme Court of the United States must have more important things to do, and that there must be hundreds of petitioners far more worthy of this Court's attention.

Rule 10 of the United States Supreme Court Rules would certainly mandate denial of the requested writ. The rule indicates that the Court as a matter of discretion will grant the petition only for special and important reasons. There is nothing special or important about Petitioner's problem.

Here we have a litigant who filed a questionable lawsuit in April 1989. Some 27 months later, that action, having been stayed twice due to Petitioner's procedural maneuvering, has yet to proceed beyond the answer stage. This Petitioner at one point had the distinction of simultaneously pressing related proceedings in the common pleas court, the court of appeals and the Supreme Court of Ohio. Now, having pestered the United States Supreme Court, he can say he has hit for the circuit.

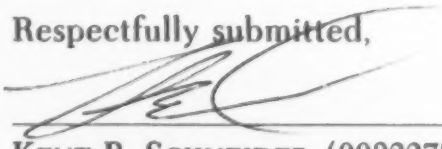
The "errors" raised by Petitioner, even if true, constitute little more than oddities or aberrations. Moreover, resolution by this Court would be of no benefit to anyone, including Petitioner. It is clear that

Petitioner would have no better luck on remand than he has had to date. Since this Court surely has more meaningful things to do than to consider the baseless, accusatory complaints of Richard G. Johnson, the petition for a writ of certiorari must be denied.

F. CONCLUSION

As has been demonstrated above, the Petitioner has no right to appeal the judgment entry of dismissal by the Supreme Court of Ohio. He also has no logical reason to assume that he did not receive an impartial adjudication before that Court. Finally, it is apparent that Petitioner's claims do not meet the criteria set by this Court for granting a petition for a writ of certiorari. It is therefore submitted that Petitioner's request for a writ must be denied.

Respectfully submitted,



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